

***Fry v. Piler*, No. 04-16876
Rawlinson, Circuit Judge, dissenting:**

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**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

I respectfully dissent from that portion of the disposition concluding that the exclusion of Pamela Maples' testimony was harmless error under *Brecht v. Abramson*, 507 U.S. 619 (1993).

Using the *Brecht* analysis, constitutional error is harmless unless it has a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 638.

In performing the *Brecht* analysis, "we consider the record as a whole," including the strength of the State's case. *Id.*

In my view, the record as a whole militates in favor of a conclusion that exclusion of Ms. Maples' testimony substantially and injuriously affected the jury's verdict in this case.

As the district court noted, this was John Fry's third trial, with the two prior juries having failed to reach a verdict. In this third trial, even in the absence of Ms. Maples' exculpatory testimony, the jury deliberated for five weeks before convicting Fry.

Ms. Maples was the only unbiased witness presented by either side. She also implicated her cousin in the murder for which Fry was on trial. Such

testimony is generally recognized as having a powerful impact on jurors. *See Skipper v. South Carolina*, 476 U.S. 1, 8 (1986) (noting that testimony of a disinterested witness “would quite naturally be given much greater weight by the jury.”); *see also Bailey v. Rae*, 339 F.3d 1107, 1116 (9th Cir. 2003) (“Independent corroboration of the defense’s theory of the case by a neutral and disinterested witness . . . can undermine confidence in a verdict.”).

Because I am convinced that the exclusion of Ms. Maples’ testimony was not harmless, I respectfully dissent.